# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of	)	
	)	
Campaign for a Commercial-Free	)	
Childhood Petition for a Declaratory	)	MB Docket No. 10-190
Ruling that a Program to be Aired by	)	
Nicktoons Violates the Children's	)	
Television Act	)	

REPLY COMMENTS OF THE
ASSOCIATION OF NATIONAL ADVERTISERS, INC.,
THE AMERICAN ADVERTISING FEDERATION,
THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, AND
THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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The Association of National Advertisers, Inc., the American Advertising Federation, the American Association of Advertising Agencies, and the Motion Picture Association of America, Inc. hereby reply to comments addressed to the Petition for Declaratory Ruling of the Campaign for a Commercial-Free Childhood ("CCFC Petition") in the above-captioned matter.

#### INTRODUCTION AND SUMMARY

Comments both favoring and opposing CCFC's Petition undercut claims that Skechers Entertainment's *Zevo-3* program violates advertising limits in the Children's Television Act and FCC rules. Instead, they confirm that *Zevo-3* is "fully consistent with both the spirit and the letter of the [Act] and [FCC] children's programming polices" as established decades ago and still applied today. Comments of MTV Networks at 6. They also confirm that granting the CCFC Petition would require – and that its supporters seek – a new policy of general application that abandons the balanced approach the Commission historically has applied to programs like *Zevo-3*. Most comments supporting CCFC, like the Petition itself, seek to reverse Commission

policy without even mentioning the most relevant FCC precedents on the issue, let alone show why their underlying rationale is no longer sound. None of the comments supporting the CCFC Petition suggest how the Commission can avoid the practical and constitutional pitfalls that factored into the FCC's key decisions in this area.

### I. THE COMMISSION SHOULD NOT ABANDON ITS BALANCED APPROACH TO CHILDREN'S PROGRAMMING

Nothing in the record supports changing the FCC's children's television policies so as to restrict children's shows simply because characters have commercial origins. <sup>1</sup> The Advertising Associations' initial comments explained how the Commission applies the Act and its rules and policies to avoid intruding on editorial judgments and/or chilling the production and financing of children's shows, and why granting the CCFC Petition would depart fundamentally from that approach. Specifically, the FCC now uses objective standards to separate programs from ads. *Id. See* Comments of Skechers USA, Inc. ("Skechers"), at 13 (FCC "properly insist[s] upon clear, easy-to-apply regulations regarding children's television"). These include the Act's limit on commercial time in children's shows to 12 minutes on weekdays, 10.5 minutes on weekends, and requiring "bumpers" around commercial breaks. The rules also ban host-selling by a program's talent or characters, as well as program-length commercials in the form of both shows dedicated to sales messages, or programs that insert ads for a product or character associated with the show during or adjacent to it. Advertising Associations at 3, 6, 8 (citing 47 U.S.C. § 303a; *CTA R&O*, 6 FCC Rcd. at 2112, 2117-18). The CCFC Petition ignores FCC polices that

<sup>&</sup>lt;sup>1</sup> See Comments of the Association of National Advertisers, Inc., the American Advertising Federation, and the American Association of Advertising Agencies ("Advertising Associations") at 3, 6, 8 (quoting and citing Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd. 2111, 2117-18 ("CTA R&O"), on recon., 6 FCC Rcd. 5093, 5098-99 (1991) ("CTA MO&O"); Action for Children's Television v. KTTV, 58 R.R.2d (P&F) 61, 67 (1985) ("ACT v. KTTV")).

allow children's programs named for, or that depict, toys or characters that predate production of the show. <sup>2</sup>

Most comments supporting CCFC's Petition offer little or no legal analysis <sup>3</sup> or any substantive discussion of controlling FCC precedent. *E.g.*, Free Press at 3-4, 5-6. The few that take note of prior Commission decisions acknowledge that *Zevo-3* does not violate the Act or any existing FCC rule or policy. Comments of Dr. Dale Kunkel ("Kunkel") at 10-17. However, these parties leave no doubt the request for a ruling on *Zevo-3* is not about whether it complies with FCC rules – it does – it is a request for a "comprehensive re-imagination of the entire construct of children's television regulation to prohibit … overlap between the commercial and entertainment realms." <sup>4</sup> None of these comments provide grounds for such a radical policy change.

#### A. Zevo-3 Complies with Existing Law and Policies

The MTV Networks' and Skechers' comments verify that Zevo-3, as developed and telecast, complies with the Children's Television Act and FCC rules and policies. They explain

<sup>&</sup>lt;sup>2</sup> *Id.* at 5-7 (discussing *In re Complaint of Topper Corp.*, 21 FCC.2d 148 (1969), *aff'd* 23 FCC.2d 132 (1970), *reaffirmed sub nom. American Broad. Co.*, 23 FCC.2d 134 (1970) (the "*Hot Wheels*" cases); *CTA R&O*, 6 FCC Rcd. 2111; *CTA MO&O*, 6 FCC Rcd. 5093; *ACT v. KTTV*, 58 R.R.2d 61).

<sup>&</sup>lt;sup>3</sup> See, e.g., Letter of Undersigned Members of Food Marketing Workgroup ("FMWG"), passim; Comments of American Academy of Child and Adolescent Psychiatry et al. at 1; Comments of Free Press at 5-6. See also Advertising Associations at 5 (showing CCFC Petition provides very little legal analysis).

<sup>&</sup>lt;sup>4</sup> MTV Networks at 18 ("The Petition calls for a dramatic expansion of [] children's programming polices."); *accord* Advertising Associations at 2. *See* Kunkel at 15-17 (arguing "FCC's current policy on children's program-length commercials is fundamentally flawed," and urging it to either initiate rulemaking concurrent with granting the CCFC Petition to change the policy, or reconstitute how statutory minutes-per-hour ad limits apply). *See also* FMWG at 1, 3 (claiming "[s]pokescharacters are essentially trademarks" whose "presence ... should be treated as advertising," and urging FCC "to halt the [their] use in program[s]"); Letter from Judy Grant, Campaigns Director, Corporate Accountability International, at 1 (speculating on future of children's shows "[i]f the FCC allows *Zevo-3* to air").

that "from the start," the goal was to create "a show that is both educational and entertaining." Skechers at 4. There can be no question about the track record of the Nickelodeon family of channels in this regard. *See* MTV Networks at 4-5, 11-12. *See also id.* at 11 (discussing *bona fides* of Skechers Entertainment's S.V.P. of Creative Development, who is executive producing *Zevo-3*). The companies developed a show that took off from the *Zevo-3* characters' commercial origins, with storylines that "center on issues ... such as school, jealousy, friendship, peer pressure and family." Skechers at 4. The "reality is that to support a recurring television program, the characters [] must take on deeper and more nuanced personas." MTV Networks at 11. In this and other ways, *Zevo-3* is no different from other children's programs that have been carried on broadcast and cable networks for more than 40 years. *Id.* at ii; Skechers at 5.

The MTV Network and Skechers comments also confirm that Zevo-3 adheres to existing rules and policies, including the host-selling and program-length commercial prohibitions. Under the rules, "Zevo-3 can only rightfully be evaluated based on the content of the program, not extraneous other matter." MTV Networks at 9; Advertising Associations at 2, 11. As MTV notes, "[n]ot even CCFC disputes that the Zevo-3 characters, during ... the program, [do not make] any references to ... Skechers footwear." Further, "Zevo-3 does not involve host-selling because [its] characters do not endorse any products either during the show or [its] commercials." Skechers at 2. See also id. at 9-10. Its "plot lines ... do not center around the shoes [or] include any product placement," id. at 4, and the "characters ... [do not] refer to" or "go out

MTV Networks at 9 (original emphasis omitted). See also Skechers at 6 ("CCFC concedes that Zevo-3 does not mention the Skechers brand or any [] Skechers product."). Even those supporting the CCFC Petition admit the show does not violate the Children's Television Act or current FCC rules or policies. Kunkel at 12-16. Rather, they concede that before Zevo-3 could be held unlawful, the Commission would have to "issue a Notice of Proposed Rulemaking to clarify and/or revise its policy," id. at 16, or pursue an "alternative" that is "more complicated." Id. at 17.

of their way to indicate (overtly or implicitly) that their shoes bear any relation" to the show. MTV Networks at 9-10. And MTV states that "Nicktoons will not include in any *Zevo-3* telecast any commercial for Skechers products." *Id.* at 8.

However, compliance with existing policy is not the petition's central focus. CCFC and supporting commenters are more concerned with what they characterize as inescapable associations children may form when characters that first were introduced in a commercial context become the subjects of an animated program. However, these stated concerns overlook the fact that the Commission has addressed these same questions in the past. Advertising Associations at 3-11. It found that the claims about confusion were speculative and that objective separations requirements were sufficient to avoid the problem. More to the point, however, the Commission found that the complaints about confusion were not unique to the situations in which the commercial characters were introduced first and the program was developed afterward. Rather, the concerns were equally applicable where fictional characters later became associated with commercial uses. As a consequence, the FCC found that any attempt to craft rules to distinguish these situations would be unworkable and would require excessive government intrusion into the editorial and creative process. Id. at 8-12. Now, however, the CCFC Petition and supporting commenters are asking the Commission to reject its time-tested approach.

### B. Commenters Supporting the CCFC Petition Do Not Address the Rationale of the Commission's Current Policies

Comments supporting CCFC's Petition provide no basis for expanding the Commission's children's programming policy. As an initial matter, there is confusion among CCFC supporters about what existing FCC rules allow. Some overstate what current policy prohibits, arguing that current restrictions encompass *Zevo-3*. *E.g.*, Corporate Accountability Int'l at 1-2; Free Press at

4-6. Others claim that under the current policy on program-length commercials, a children's program may incorporate "elaborate and overt commercial promotions" yet avoid being labeled a program-length commercial simply by eschewing "ads for program-related products during breaks." Kunkel at 14. But that is simply incorrect. The host-selling ban precludes "overt commercial promotion" by a show's talent or characters. Likewise, any children's program that contains overt or elaborate sales messages would violate the minutes-per-hour advertising limits, even if commercial breaks include only ads wholly unrelated to the show. <sup>6</sup> These rules, however, recognize that mere appearance of a character is not the *sine qua non* of advertising; it is the association of a character with an overt commercial promotion.

The few supporting comments that address prior FCC decisions in this area distort the Commission's holdings. One commenter, for example, cites the *Hot Wheels* cases as support for the CCFC Petition, but fails to explain the Commission's ultimate conclusion. Kunkel at 8-9, 16. It also failed to acknowledge the FCC's subsequent pronouncement that, to the extent the *Hot Wheels* decisions have been interpreted as finding program product licensing and associated off-program advertising inherently contrary to the public interest, they have been read too broadly. *ACT v. KTTV*, 58 R.R.2d at 67 n.18. *See also CTA R&O*, 6 FCC Rcd. at 2118. The pro-CCFC comments fail to address the vital counter-balancing interests the FCC articulated. These include

Similarly, contrary to some pro-CCFC comments, "industry interests" do not believe the program-length commercial ban "places no limits on commercialization" in kids' shows "so long as no spot ad[s] for a program-related product appear[.]" Kunkel at 15. Skechers and MTV Networks illustrate that program producers and distributors ensure no host-selling, product placement, or similar sales efforts occur. *See* MTV Networks at 5, 6, 8-9; Skechers at 4, 6-7, 9-10. There also is no merit in seeking to distinguish *Zevo-3* from shows the petitioners believe to be more valuable (or more palatable to the FCC) based on claims that "educational, informational, or other nonfiction content offer[s] limited potential to promote toys and other product[s]." Kunkel at 12. The Commission previously has rejected such arguments. *CTA R&O*, 6 FCC Rcd. at 2117 ("acclaimed children's shows such as Sesame Street and Disney programs [] have products associated with them").

"preserv[ing] creative freedom and [] revenue sources that make children's programming possible," *e.g.*, Skechers at 5 (quoting *CTA R&O*, 6 FCC Rcd. at 2117), and taking a "restrained" approach given "the First Amendment context" of the issues. Advertising Associations at 11 (citing *CTA R&O*, 6 FCC Rcd. at 2118). *See also* MTV Networks at 13-16 (citing *CTA R&O* and *ACT v. KTTV*). Commenters supporting CCFC apparently are unconcerned that the approach they advocate would "stifle creativity by restricting [] sources [] writers could draw upon for characters." *CTA R&O*, 6 FCC Rcd. at 2117. Fortunately, however, other comments explain the role of creative flexibility in developing enriching children's programming. MTV Networks at 3, 5; Skechers at 4, 8.

Comments of Skechers and MTV Networks vividly demonstrate the types and breadth of programs that would be rendered unlawful in one fell swoop by granting CCFC's Petition. Skechers correctly notes that "any television show featuring" popular characters such as G.I. Joe, Elmo, Batman, Pokémon, the Transformers, the Care Bears, and the Teenage Mutant Ninja Turtles would be prohibited under CCFC's reasoning and that of its supporters. <sup>7</sup> Supporters of the CCFC Petition do not disagree with this – they just see it as a good thing. For example, one comment favoring grant of the Petition also lists a number of programs that CCFC's supporters evidently would like to see banned, including *G.I. Joe, He-Man, Strawberry Shortcake*, and *Teenage Mutant Ninja Turtles*. Kunkel at 11.

<sup>&</sup>lt;sup>7</sup> Skechers at 10. *See also* MTV Networks at 14 (discussing Dungeons and Dragons, Rubik's Cube, and other shows preserved by *ACT v. KTTV*) (citing 58 R.R.2d at 62); Skechers at 8 (describing FCC rejection of a framework that would "jeopardize highly acclaimed children's shows such as Sesame Street and Disney programs") (quoting *CTA R&O*, 6 FCC Rcd. at 2117, and citing *CTA MO&O*, 6 FCC Rcd. at 5099 & n.80). MTV resorted to small font just to fit on a single page a representative list of the types of children's programs that could be lost under such an approach.

Proponents of more restrictive children's programming policies also are quite cavalier about the economics of producing high-quality shows. The record supports FCC decisions to avoid "limit[ing] revenues from merchandising [as a] source of production funding." *See* Skechers at 7-8 (quoting *CTA R&O*, 6 FCC Rcd. at 2117-18); *accord* MTV Networks at 16. The "panoply of options" for quality children's programs "did not arise by accident," but rather, resources from the "commercial realm" are needed "to cultivate an environment in which children's programming [] thrive." MTV Networks at 3 (citing 47 U.S.C. § 303a notes (1) & (3)).

The Skechers Comments reflect its dedication to developing the *Zevo-3* program, and the financial support that entails. Skechers at 4-5. Even for the Nickelodeon family of channels – one of the most, if not the most, prolific sources of educational, entertaining and pro-social children's shows – commitments such as Skechers' are crucial in that "educational ... and pro-social ... programming is expensive." MTV Networks at 5. Contrary to claims of CCFC supporters, the Commission did not "ignore compelling child-protection concerns" or "fail[] to take into account" the prospect of shows like *Zevo-3*. Kunkel at 17-18. Rather, it expressly considered regulatory options like those proposed here and rejected them for sound policy reasons.

Parties supporting CCFC's Petition also fail to offer practical solutions to the problem of basing children's programming limits on the product licensing/program production sequence or on producers' subjective intentions. <sup>8</sup> In fact, one CCFC supporter frankly admits that some options for clamping down could be even "more complicated." Kunkel at 17. *Zevo-3* illustrates the shortcomings of timing criteria in particular. Skechers plans to license *Zevo-3* and its characters for toys and other children's products, Skechers at 5, but would the CCFC Petition

<sup>&</sup>lt;sup>8</sup> See Advertising Associations at 9-10 (citing ACT v. KTTV, 58 R.R.2d at 67; CTA R&O, 6 FCC Rcd. at 2118; 6 FCC Rcd. at 5099). See also Skechers at 7-8 ("whether the creator of a program intended to sell products through a related program is a ... difficult endeavor") (quoting CTA R&O, 6 FCC Rcd. at 2118).

have been moot if Nicktoons and Skechers had waited until after the toys appeared and entered children's collective conscious *before* airing the *Zevo-3* show? And should that matter? For some commenters, the sequence is irrelevant and all such programs should be prohibited. *See* Kunkel at 11. But, that is not the Commission's current position, and assuming the Commission's current policies are maintained, the comments do not explain how *Zevo-3* differs from *He-Man*, *Transformers*, *G.I. Joe*, or any other such programs.

Ultimately, the FCC established a framework that protects children from over-commercialization, but at the same time created a fertile environment for the evolution of robust choices among educational, entertaining, and pro-social children's programs. And it achieved these results not only for all the reasons described above, but also out of respect for the First Amendment context in which it regulates. *See*, *e.g.*, MTV Networks at 22. This, too, is a crucial consideration, given the constitutional ramifications that would attend granting the CCFC Petition or initiating yet another proceeding to retread settled ground.

### II. CCFC's PROPOSED CHANGE WOULD CREATE SERIOUS FIRST AMENDMENT CONFLICTS

Granting CCFC's Petition to effectively prohibit *Zevo-3* would present unavoidable First Amendment problems. CCFC wants *Zevo-3* outlawed on broadcast, cable, or DBS networks, solely because some of its characters formerly served marketing purposes. <sup>9</sup> But the program is fully protected expression for constitutional purposes. A flat ban on such shows would violate any First Amendment standard.

<sup>&</sup>lt;sup>9</sup> See Advertising Associations at 2 (quoting CCFC Pet. at 12); *id.* at 5-7; MTV Networks at 6, 8, 13, 19; Skechers at 7 ("CCFC [] argues [] Zevo-3 is a program-length commercial because children may associate the show's characters with Skechers shoes").

### A. Heightened First Amendment Scrutiny Governs the CCFC Petition

Heightened constitutional scrutiny applies to the CCFC Petition because it asks the FCC to restrict programming content. As explained below, *Zevo-3* is not commercial speech, so application of less than strict scrutiny cannot be justified on that basis. Further, CCFC and its supporters seek FCC action principally based on Skechers' involvement in development of the show. *See supra* at 5. But targeting particular speakers, or the financial support for their speech, also triggers heightened constitutional review.

### 1. Zevo-3 is Not Commercial Speech

Comments seeking a ban on cable, DBS, and broadcast outlets airing *Zevo-3* and similar shows raise important threshold questions regarding the constitutional standard that would apply. The fact that *Zevo-3* characters first appeared in Skechers marketing does not mean that a ban on the show is properly analyzed under commercial speech doctrine. Dictating what characters may appear in a program with no overt sales message, and that otherwise satisfies all applicable children's advertising limits, directly affects its narrative and cuts to the heart of the creative and editorial processes. <sup>10</sup> Such content-based speech restrictions are presumed invalid unless the government shows they are the least restrictive means of serving a compelling government interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

The Supreme Court has stressed that the "core notion of commercial speech" is "speech which does 'no more than propose a commercial transaction." *Bolger v. Youngs Drug Products*, 463 U.S. 60, 66 (1983). The record is clear that *Zevo-3* does not propose any such transaction, and that ads in its commercial breaks are unrelated to any Skechers product. *See supra* at 4-5. In short, its producers make a compelling case that the program itself has no commercial content,

<sup>&</sup>lt;sup>10</sup> MTV Networks at 11-12, 18-21; Skechers at 10. See Advertising Associations at 3-4, 7-8.

and that the show is specifically designed to exclude advertisements for related products. That Skechers may benefit financially, or receive an "advertising boost," CCFC Pet. at 12, does not make the program an "advertisement" subject to the commercial speech doctrine, and it does not alter the constitutional analysis. Expression may be presented for pecuniary gain, but so are "books, newspapers, and motion pictures, which are not on that account classified as 'commercial speech." *Chase v. Davelaar*, 645 F.2d 735, 738 (9th 1981) (citing, *inter alia*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)). So, indeed, are commercial television programs themselves.

Zevo-3 neither violates the prohibitions on host-selling and program-length commercials, nor qualifies as "commercial matter" under, e.g., 47 C.F.R. § 76.225 n.1, and accordingly is not an advertisement as defined in the children's programming rules. See supra at 4-5. Also, as the Commission is well aware, the fact that a program is sponsored does not mean it is advertising. For example, the FCC's noncommercial broadcast rules distinguish paid program sponsorship, including displays of trademarks and corporate logos, from "advertising" that uses comparative language and/or "calls to action." While such mentions may require sponsorship identification, it is clear that the appearance of mere brand names and corporate logos do not constitute "advertising" as defined in the Act. 12

Further, even if the Commission agreed with CCFC's erroneous assertions that Zevo-3 exists primarily for marketing purposes, the commenters do not address the First Amendment implications of regulating programming content directly because of concern that it may have

<sup>&</sup>lt;sup>11</sup> See MTV Networks at 6, 9-10; Skechers at 2, 4, 6, 9-10.

See 47 U.S.C. §§ 317, 399B(a). See also Commission Policy Concerning the Non-commercial Nature of Educational Broadcasting Stations, 7 FCC Rcd. 827 (1992) (cited in Advertising Associations at 7); Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, 97 FCC.2d 255 ¶ 3 (1984).

some commercial impact. As noted above, the Supreme Court does not treat programming as commercial speech, and it does not apply a reduced level of First Amendment scrutiny because content may be characterized as partly commercial. *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 796 (1988). Although CCFC and its supporters urge the Commission to act here because they claim "[t]here is no way to separate the programming content from the commercial content of *Zevo-3*," Pet. at 15, this is precisely why a higher level of constitutional scrutiny applies.<sup>13</sup>

#### 2. The CCFC Petition Advocates Speaker-Based Regulation

Heightened scrutiny also is appropriate for other reasons. CCFC targets *Zevo-3* based on concerns that Skechers created the program out of commercial interests using characters initially developed for marketing purposes. In CCFC's view, the Children's Television Act allows only children's shows with characters developed without reference to commercial interests or existing goods or services. Only after finding an audience may such programs perhaps give rise to program-related toys or products. But as Skechers rightly notes, such "speaker based laws demand strict scrutiny when they reflect the Government's preference for the substance of what [] favored speakers have to say (or aversion to what [] disfavored speakers have to say)." Skechers at 12 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)).

In addition, strict scrutiny applies because granting the CCFC Petition would adversely affect both the "integral" way children's programs are funded through related product marketing,

<sup>&</sup>lt;sup>13</sup> See, e.g., Hays County Guardian v. Supple, 969 F.2d 111, 120 (5th Cir. 1992) (university prohibition on on-campus solicitation unconstitutionally restricted distribution of newspapers containing ads); S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1144 (9th Cir. 1997) (plaintiffs were likely to succeed on First Amendment challenge to canvassing restriction that applied to "fully protected expression that contains some form of advertising"); Perry v. Los Angeles Police Dep't, 121 F.3d 1365, 1368 (9th Cir. 1997) (full First Amendment protection applies to commercial products inextricably intertwined with noncommercial messages); Gaudiya Vaishnava Soc'y v. City and County of San Francisco, 952 F.2d 1059, 1065 (9th Cir. 1990) (same).

and the availability of "alternative methods of financing" such as Skechers' involvement in *Zevo-3*. <sup>14</sup> Courts have recognized that in evaluating the impact of regulation, they must assess the effect it has on economic viability. This conclusion followed from the Supreme Court's opinion in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991), which invalidated a so-called "Son of Sam" law because it "impose[d] a financial disincentive" on "speech of a particular content." *Id.* at 116.

The Commission has recognized the financial harm and resulting impact on children's shows that over-regulating can cause. *CTA R&O*, 6 FCC Rcd. at 2117-18; *CTA MO&O*, 6 FCC Rcd. at 5093. Even CCFC's supporters tacitly acknowledge this concern. *See* Kunkel at 11. The CCFC Petition seeks to have the Commission impose burdens similar to those reviewed in *Simon & Schuster*, and thus raises the same constitutional concerns.

## B. The FCC Cannot Constitutionally Extend Broadcast Regulation to Other Media, Nor Can It Count on Being Able to Justify Reduced First Amendment Protection for Broadcasting on Spectrum Scarcity

The CCFC Petition raises serious constitutional questions for additional reasons. The FCC has never had the same constitutional authority to regulate other media as it does broadcasting, and even the authority to restrict broadcast content has eroded over time. The Children's Television Act and related FCC policies apply to children's cable shows solely through a definition that simply says "the term 'commercial television broadcast licensee' includes a cable operator." 47 U.S.C. § 303a(d). But that Act cannot confer on the FCC greater constitutional authority to regulate cable than the First Amendment allows. *See generally, e.g., Playboy Entm't Group*, 529 U.S. 803.

Advertising Associations at 6, 9 (quoting CTA R&O, 6 FCC Rcd. at 2118 and Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward Elimination of Sponsorship and Commercial Content in Children's Programming, 50 FCC.2d. 1, 11 (1974), and citing ACT v. KTTV, 58 R.R.2d at 67 n.20).

This attempt to confer jurisdiction by changing the definition has never been judicially approved. In the intervening years, however, every court to address the issue confirmed that the FCC lacks constitutional authority to regulate nonbroadcast media under a lower level of scrutiny. As the Supreme Court and other appellate courts have made clear, "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation ... does not apply in the context of cable regulation." *Turner Broad. Sys.*, 512 U.S. at 637. *See also Playboy Entm't Group*, 529 U.S. at 815; *Denver Area Educational Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28 (D.C. Cir. 1977). As the Supreme Court explained:

The broadcast cases are inapposite ... because cable television does not suffer from [] inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.

Turner Broad. Sys., 512 U.S. at 638-39. Simply put, the FCC does not have the constitutional authority to impose content regulations based on the assumption that cable is "like" broadcasting. See Playboy Entm't Group, 529 U.S. at 815 (citing "key difference" between cable and broadcasting); Time Warner Entm't Co., L.P. v. FCC, 56 F.3d 151, 181 (D.C. Cir. 1995).

Even if the CCFC Petition targeted broadcast programming, however, the lower level of scrutiny that previously rested on spectrum scarcity is no longer supportable. To whatever extent the "public interest" standard might have permitted content regulation in the past, courts have

begun to reduce the latitude accorded the FCC. <sup>15</sup> It has been more than 40 years since *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). That case, based on "the present state of commercially acceptable technology as of 1969," no longer reflects the current media landscape. <sup>16</sup>

Meanwhile, both Congress and the Commission have noted vast changes in the media marketplace. The 1996 Telecommunications Act's legislative history suggested that traditional justifications for FCC regulation of broadcasting require reconsideration, and that the market has undergone such significant evolution that "the scarcity rationale for government regulation no longer applies." <sup>17</sup> The FCC has reached similar conclusions. In the mid-1980s, for example, it "found that the 'scarcity rationale,' which historically justified content regulation of broadcasting ... is no longer valid." <sup>18</sup> More recently, it found "the modern media marketplace is far different than just a decade ago," that traditional media "have greatly evolved," and "new modes ... have

<sup>&</sup>lt;sup>15</sup> See, e.g., Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); Radio-Television News Directors' Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000) (per curium). Courts have noted that the "power to specify material the public interest requires or forbids to be broadcast ... carries the seeds of the general authority to censor denied by the [] Act and the First Amendment." Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 172 (D.C. Cir. 1968) ("the First Amendment demands that [the FCC] proceed cautiously").

<sup>&</sup>lt;sup>16</sup> News America Publ'g, Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988); Meredith Corp. v. FCC, 809 F.2d 863, 867 (D.C. Cir. 1987) ("the rationale of Red Lion is not immutable"). See Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir. 1968) ("some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets").

<sup>&</sup>lt;sup>17</sup> Communications Act of 1995, H. Rep. No. 104-204, at 54 (1995). *See* also Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, at 2-3 (1995) ("Changes in technology and consumer preferences have made the 1934 Act a historical anachronism.").

<sup>&</sup>lt;sup>18</sup> Meredith Corp., 809 F.2d at 867 (citing Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC.2d 143 (1985)). See Syracuse Peace Council v. FCC, 867 F.2d 654, 660-66 (D.C. Cir. 1989) (upholding FCC's repeal of fairness doctrine).

transformed the landscape." <sup>19</sup> An FCC staff analysis concluded that the spectrum scarcity rationale "no longer serves as a valid justification for ... intrusive regulation of traditional broadcasting," leaving content regulation "severely undermined by plentiful channels." <sup>20</sup>

Current Commission reports confirm these transformative changes. For example, the most recent Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming found that in almost 90 percent of households broadcast TV is supplemented by dozens or hundreds of cable or satellite channels. 24 FCC Rcd. 542, 546 (2009) ("Thirteenth Annual Report"). Internet-based video continues to increase significantly each year as the overall number of U.S. households having access to the Internet continues to grow, with nearly 70 percent subscribing to Internet service. Id. at 549-50. Approximately 60 percent of Internet users view and/or download videos online. In fact, the Commission launched an entire inquiry in response to issues raised by the extent to which children live in a "dramatically different" media environment where they "have access to a wide array of electronic media technologies." Empowering Parents and Protecting Children in an Evolving Media Landscape, 24 FCC Rcd. 13171, 13174, 13187-88 (2009) ("Children's Media Inquiry").

The Commission thoroughly documented the changes in a comprehensive report in *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies* for Video or Audio Programming, 24 FCC Rcd. 11413 (2009) ("CSVA Report"). It found, for example, that "[t]he number of suppliers of online video and audio is almost limitless." *Id.* at

<sup>&</sup>lt;sup>19</sup> 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620, 13647-48 (2003) ("Biennial Regulatory Review").

John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Media Bureau Staff Research Paper, March 2005) at 8, 11. The report also concludes that alternative rationales for broadcast content regulations are similarly flawed. *Id.* at 18-28.

11468. In addition to recounting the above developments, the Commission reported that "77 percent of teens in the U.S. have their own mobile phone[s]" which increasingly are used to access video content from the Internet and other sources. *Id.* at 11414-15 & n.5. Consistent with this trend, mobile services now offer a range of video offerings for cell phones and other mobile devices. *Thirteenth Annual Report*, 24 FCC Rcd. at 549, 610-12. This "explosion of media sources," including the penetration of nonbroadcast options and the "omnipresent" Internet, has not gone unnoticed by the courts. *E.g.*, *Fox Television Stations*, *Inc. v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010) (citing *Thirteenth Annual Report*, *CSVA Report* and *Children's Media Inquiry*).

In this evolving media environment, aggressive new content regulations would be particularly vulnerable to constitutional challenge. For example, in *MPAA v. FCC*, the D.C. Circuit vacated video description rules. 309 F.3d 796 (D.C. Cir. 2002). Though it analyzed only whether the FCC had the statutory authority to adopt the rules, it explained that it interpreted the Commission's powers narrowly because regulation of programming content "invariably raise[s] First Amendment issues." *Id.* at 805. Likewise, the D.C. Circuit ordered repeal of the personal attack and political editorial rules after the FCC failed to carry its burden to justify "interfer[ing] with editorial judgment of [] journalists and entangl[ing] government in day-to-day operations of the media." *RTNDA v. FCC*, 229 F.3d 269. In this environment, altering children's programming policies to intrude on creative and editorial processes and undermine financial support for children's shows would face significant First Amendment scrutiny.

## C. The Commission Cannot Justify Heightened Regulation on the Asserted Ground that Zevo-3 is Deceptive or Misleading

Claims that children's programs like *Zevo-3* are "inherently deceptive" simply because they feature characters that have commercial origins cannot support a total ban on the program, just as an attempt to ban product licensing associated with products developed for television,

books or movies is not constitutionally supportable. *See*, *e.g.*, CCFC Pet. at 15; Kunkel at 3, 15, Free Press at 1. The government may perhaps have greater leeway regulating speech that is misleading, but there is nothing inherently deceptive about *Zevo-3* based on the show's narrative itself. *See* MTV Networks at 8-12; Skechers at 2-7. No fact is misrepresented, nor are viewers misled by anything the fictional cartoon characters do or say. The only basis for claims by CCFC and others that the show is misleading rests on the extraneous matter of its producers' intentions. This does not make the show itself deceptive, nor does it distinguish *Zevo-3* from programs that have aired for generations.

Based on the Commission's long experience in this area, there is no basis for the claim that *Zevo-3* is more likely to deceive children because the characters were first introduced in a commercial context. The question of which came first is irrelevant to the child audience. Where earlier generations of children might first have learned about Davey Crockett because their parents bought them a coonskin cap, or Peter Pan because they like peanut butter, the possibility of an association between a commercial product and a beloved fictional character cannot be addressed intelligibly by regulating children's fiction. Any attempt to do so intrudes deeply into the creative process and undermines support for children's programming.

Realizing this, the Commission focused instead on objective criteria for separating commercials from programming. It found that separation of program and commercial material would "ensure that the child audience is not deceived." *ACT v. KTTV*, 58 R.R.2d at 66. This approach has proven successful over the years, and Nicktoons and Skechers have taken precisely those steps. *See supra* at 4-5. Commenters insisting that *Zevo-3* and similar shows are "deceptive" because a commercial character existed before the program may not like this policy determination, *e.g.*, Kunkel at 3, 15, but that is not grounds for the FCC to reverse course.

The Commission has made clear that programs like Zevo-3 cannot be banned based on speculative claims of deception or confusion. See ACT v. KTTV, 58 R.R.2d at 66. This policy determination is supported by First Amendment doctrine. Ibanez v. Florida Dep't of Bus. & Prof. Reg., 512 U.S. 136, 143 (1994) (restrictions on speech cannot be backed by only "unsupported assertions"); Rubin v. Coors Brewing Co., 514 U.S. 476, 490 (1995) ("anecdotal evidence and educated guesses" do not suffice). Moreover, even where speech is potentially misleading, the constitutionally acceptable solution, even under more forgiving commercial speech standards, is to require the very type of separations policies the FCC has employed in this area, and which MTV and Sketchers have confirmed will be rigorously applied. See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651-52 n.14 (1985). An outright ban on Zevo-3, as CCFC has proposed, would not stand.

#### CONCLUSION

For the foregoing reasons, the Commission should deny the Petition.

Respectfully submitted,

Association of National Advertisers, Inc. American Advertising Federation American Association of Advertising Agencies Motion Picture Association of America, Inc.

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